IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPEAL NO.35 OF 2000

Joao Coutinho @ Makod,
S/o. Aleluia Coutinho,
through the Superintendent,
Central Jail, Aguada. .... Appellant.

V/s.

S T A T E
as represented by
Officer-in-Charge,
Vasco Police Station,
Vasco, Goa. .... Respondent.

Mr. P.P. Singh, Advocate for the Appellant.

Mr. A.P. Lawande, Public Prosecutor for the State/ Respondent.

CORAM : P.V. KAKADE &
P.V. HARDAS, JJ.

DATED : OCTOBER 1, 2002.

ORAL JUDGMENT : (Per **HARDAS, J.**)

Appellant/Accused No.1 stands convicted for an offence punishable under Section 302 of the Indian Penal Code and sentenced to undergo Imprisonment for Life and a fine of Rs.500/-, in default, six months Rigourous Imprisonment and original accused No.2 was convicted for an offence punishable under Section 323 of the Indian Penal Code and sentenced to Rigourous Imprisonment for one year by the Sessions Judge, South Goa, Margao, by Judgment dated 13.4.2000 in Sessions Case No.32/1997. The appellant, who is original accused No.1, has filed

the present appeal, challenging his conviction and sentence.

2. The brief facts, necessary for decisions, are set out hereunder :

In 1997, Pw.24, Police Inspector (PI), Abdul Aga was working as Officer Incharge of Vasco Police Station. On 13.8.1997, at about 11.15 p.m., A.S.I. Patil, Duty Officer, came to the residence of Pw.24, PI Aga and informed him that the duty Hawaldar, one Head Constable Chauhan had received a telephonic message from an unknown person that a fight had taken place near Pai Nursing Home at Vaddem. The Head Constable Chauvan had proceeded to verify the information and had informed the A.S.I. Shri Patil from the Cottage Hospital, Chicalim that the victim of the fight had expired. Pw.24, PI Aga visited the Chicalim Hospital and found the deceased one Caetan Fernandes alias Nani on the stretcher near the casualty. He deputed two policemen to guard the dead body and proceeded to the scene of offence at Vaddem. He could not draw the panchanama of the scene of offence as it was night and, therefore, posted some guards. He returned to the Vasco Police Station and recorded the First Information Report (FIR) of Pw.9, Josico Fernandes, brother of the deceased at about 2 a.m. on 14.8.1997. Exhibit-29 is the FIR of Pw.9. Pw.24, PI

Aga then deputed Pw.5, Police Sub-Inspector (PSI), Nolasco Raposo to apprehend the accused. At about 3.00 a.m., PSI Raposo produced accused No.1 before Pw.24, PI Aga. Pw.24, PI Aga then arrested accused No.1 under an Arrest Panchanama, Exhibit 45, in presence of pancha witness Devidas Salgaonkar, Pw.12 and another person. Under the said panchanama, a long sleeves white shirt and one loongi, viz. MOs. 1 and 2 were also attached. The said muddemal property was sealed by obtaining signatures of the panchas and that of accused No.1. Since accused No.1 had a fresh cut injury on his thumb, he was sent to Chicalim Hospital. At the hospital, accused No.1 was examined by Pw.21, Dr. Vallabh Nadkarni, the Medical Officer on duty at the cottage hospital. Pw.21, Dr. Nadkarni found a contused lacerated wound of 3 x 1 cms.above base of right thumb, caused by a sharp object, simple in nature, which was less than 24 hours of duration. In the opinion of Pw.21, Dr. Nadkarni, the said injury could be caused by base of the blade of the knife, MO.12.

3. Pw.24, PI Aga then drew the inquest panchanama of the dead body of the deceased in presence of two panchas, namely Pw.10, Dasharath Dhuri and another. The inquest panchanama is at Exhibit-35. The clothes of the deceased were attached as also the wrist watch and identity card of the deceased. Pw.23, Shaikh

Salim, a Photographer, had taken the photographs of the dead body of the deceased which are at Exhibit 68-A to Exhibit 68-E. After the inquest panchanama, the dead body was sent for post mortem examined by a letter at Exhibit-38. Pw.11, Dr. Avinash Pujari, conducted post-mortem examination. Pw.11, Dr. Pujari noticed the following injuries :

> (1) Incised stabbed wound leaving cut margins, both angles acute 10.00 cms. from midline, 7 cms. below left nipple. It was 3.50 x 1.5 cavity deep It was on the chest front left side below nipple oblique, upper end near to midline lower end to left lateral;
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> (2) Incised stabbed wound of size 3.00 x 1.5 x 7.00 cms. on right side chest front;
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> (3) Incised stabbed wound of size 3.00 x 1.5 x 10.00 cms. on right side abdomen front.

Pw.11, Dr. Pujari opined that all the injuries were ante-mortem in nature and caused by sharp edged weapon. On internal examination, he noticed that the external injury No.1 had pierced the skin, subcutaneous tissue, muscles of chest, cut the underlying 5th rib cartilage, injured parietal pleura, entered chest cavity, injured the pericardium over front of left ventricle, pierced the left ventricle wall on front through and through and entered into left ventricular chamber. The approximate depth of the injury was 8.00 to 10.00 cms. He also found that the external injuries No. 2 and 3 had pierced the muscles underneath and traversed through

muscles only. He also opined that the injuries No.1, 2 and 3 were sufficient to cause death in the ordinary course of nature. He also opined that the external injury No.1 along with the internal injuries was cumulatively sufficient to cause death in ordinary course of nature. In the opinion of Pw.11, Dr. Pujari, the cause of deceased was due to haemorrhage and shock due to incised stabbed wound on chest, involving heart. The Post Mortem Report is at Exhibit-39.

4. On 20.8.1997, Pw.11, Dr. Pujari received a letter at Exhibit-40 from Pw.24, PI Aga, requesting Pw.11, Dr. Pujari to ascertain the blood group of the accused. The blood group of accused No.1 was ascertained to be 'B Rh Positive' and the blood group of accused No.2 was ascertained to be 'O Rh Positive'. Pw.11, Dr. Pujari received another letter at Exhibit - 41 from Pw.24, PI Aga, requesting him to examine a knife, which had been seized. Pw.11, Dr. Pujari had examined the weapon and opined that the knife which had been sent for examination could have caused the external injuries No.1, 2 and 3 described in the post-mortem report. The report of examination of the weapon is at Exhibit 42. Exhibit 43 is the out-line diagram of the weapon, i.e. MO.12.

5. Pw.24, PI Aga then visited the scene of

offence and drew the panchanama of the scene of offence in the presence of Pw.1, Shivkumar Sudhakar. The scene of offence was pointed out by Pw.6, Caetan Xavier, who is the owner of the bar where the incident had occurred. The scene of offence panchanama is at Exhibit-13. The photographs of the scene of offence are at Exhibit-70 colly. The clothes of the deceased namely, shirt, MO.5, pant, MO.6 and underwear, MO.7 were attached and produced by ASI, Patil. Accused No.2 came to be arrested by, PSI, Raposo in the presence of Pw.13, Nagesh Naik, under Arrest Panchanama Exhibit-47. The clothes on the person of accused No.2, namely one half sleeves white colour shirt, MO.8 and blue colour long pant, MO.9, were attached.

6. On 16.8.97, accused No.1 showed his willingness to point out the clothes which he was wearing at the time of the incident. Accused No.1 along with the pancha, Pw.15, Prasad and the police went to the house of accused No.1. Accused No.1 broke open the lock with the help of a hammer and led the police and the panchas to kitchen cum store-room and removed a black long pant and half sleeves T-shirt which were kept on the clothes line in that room. The said clothes came to be attached and the clothes are MOs. 10 and 11. Memorandum and attachment panchanama is at Exhibit-41. Two days thereafter, that is on 18.8.1997, accused No.1

volunteered to show the place where he had hidden the knife. Accordingly, accused No. 1 and two panchas, namely Pw.17, Subhash Agapurkar and another along with the police were taken by accused No.1 to a spot known as "Poolakadem Waddem" at a small bridge. Accused No.1 took the police party, including the panchas to the right side of the bridge where there were bushes and from the bushes, he removed a stainless steel knife after searching in the bushes. The said knife is MO.12. Memorandum and the attachment panchanama is at Exhibit-54. The blade of the said knife was 17 cms. Pw.24, PI Aga requested the Assistant Engineer of Public Works Department to draw a sketch of the scene of offence and accordingly, Pw.18, Shri Salelkar prepared a sketch. The said sketch is at Exhibit-57. Pw.24, PI Aga then handed over further investigation to Police Inspector, Shri Alan D'Sa.

7. Pw.20, Alen D'Sa took over the investigation from Pw.24, PI Aga on 2.10.1997. Pw.20, PI D'Sa, after receipt of the Chemical Analyser's report at Exhibit-61 colly, filed the Charge-sheet.

8. After committal of the case to the Court of Sessions Judge, South Goa, Margao, learned Sessions Judge, South Goa, Margao vide Exhibit-6 framed the Charge against the accused for an offence punishable

under Section 302, read with 34 of the Indian Penal Code. The prosecution, in support of its case, examined 24 witnesses. The prosecution also examined Pw.6 and Pw.7 as eye witnesses. The prosecution relied on the discovery of the knife, MO.12 and the finding of the blood groups of the deceased on the clothes of accused No.1, and the injuries on the base of the thumb of accused No.1. The learned trial Court implicitly accepted the evidence of the two eye witnesses, viz. Pw.6 and Pw.7 and relying on the other corroborative evidence had convicted and sentenced accused No.1 for an offence punishable under Section 302 of the Indian Penal Code and accused No.2 for an offence punishable under Section 323 of the Indian Penal Code.

9. We heard Shri P.P. Singh, learned Advocate on behalf of the appellant and Shri A.P. Lawande, learned Public Prosecutor on behalf of the State. Mr. Singh, the learned Counsel on behalf of the appellant has urged before us that the evidence of Pw.6 and Pw.7 is contradictory inter se and is self-destructive. According to the learned Counsel for the appellant, acceptance of the evidence of any one, would automatically belie the evidence of the other and in such circumstances, it is urged that the evidence of Pw.6 and Pw.7, be disbelieved. It was also urged before us that in the event the evidence of Pw.6 and Pw.7 is

disbelieved, the circumstantial evidence by itself is insufficient for sustaining the conviction, as the circumstances so proved do not unerringly prove the guilt of the accused and thereby exclude the innocence of the accused. Mr.A.P. Lawande, the learned P.P. on behalf of the State has supported the conviction and has urged before us that the so called variations or discrepancies in the evidence of Pw.6 and Pw.7 are of peripheral nature and these discrepancies do not affect the substratum of the evidence of these witnesses, so as to disbelieve their versions, completely. Learned P.P. for the State has further urged before us that the circumstantial evidence buttresses the evidence of the eye witnesses and the learned trial Court was perfectly justified in convicting and sentencing the appellant.

10. In order to appreciate the rival submissions, it is necessary to make a brief reference to the evidence of Pw.6. Pw.6, Caitano Xavier owns a bar by name 'Zuari Bar'. He knows both, the accused and the deceased. He also knows Pw.9, Josico Fernandes, younger brother of the deceased. He states that on 13.8.1997, at about 6 p.m., the deceased and Pw.9, Josico had come to the bar and the deceased ordered for half pint of whisky. After consuming the whisky, both of them left. He states that at about 8 or 8.30 p.m., the deceased had come to the bar along with one Tito.

The deceased and Tito had ordered for whisky and brandy respectively. After consuming the drinks, both of them went away. After 9 p.m., the deceased alone came to the bar and ordered for whisky and sat at the table. At about 9.45 p.m., accused No.1, accused No.2 and one Paklo came to the bar and ordered for ginger coconut fenny. At about 10 p.m., the deceased finished his drink and was going. The said three persons had also finished their drinks and were also going out. At that time, the deceased touched the back of the head of accused No.1 and told him "borem korun", meaning that the deceased was going. At that moment, accused No.1 gave a kick on the leg. The deceased gave a fist blow to accused No.1 on his face and thereafter, accused No.2 and the deceased started fighting. Accused No.2 gave a fist blow to the deceased and the deceased also retaliated by giving first blow to accused No.1. At that time, accused No.1 removed a knife from his back pant pocket and stabbed the deceased at three places. According to Pw.6, two blows were given on the stomach and one blow on the chest of the deceased. The deceased fell down outside and in front of the bar. Pw.6 further states that he told accused No.1 to take the deceased to the Doctor. Accused No.1 replied "let him die there". Accused No.1 also threatened Pw.6 that in case Pw.6 told the incident to any one or the police, he would also be killed. Accused No.1 then put the knife in his pocket

and accused No.2 pulled the deceased and threw him on the side. Accused No.1 removed the knife and washed the same in puddle of water outside. After that, both the accused went away. Pw.6 then proceeded to the house of the deceased and woke up his brother Pw.9, Josico and informed him that the deceased had been stabbed. Pw.9, Josico along with one Mungu alias Tommy came running. Pw.9, Josico reached before Pw.6. By that time, the deceased was unconscious. Mungu arranged for a Maruti Van and took the deceased in the said Maruti van to Pai's Hospital. Pw.6 states that he also went to the hospital, but stayed out side. After sometime, a police jeep arrived there and thereafter, Pw.6 went home. He had closed the bar before going to tell Pw.9, Josico. He states that on the next day, his statement was recorded by the police. He has also identified the clothes which accused No.1 was wearing at the time of the incident. He also identified the knife, MO.12. He states that outside his bar, there was a light and across the street, there is a building known as "Sapna Building" and there was a tube-light on the said building. According to him, there was sufficient light in front of the bar where the incident had taken place.

11. In cross examination on behalf of accused No.1, Pw.6 has admitted that on the day of the incident, he, one small boy and another person were viewing the

television. He has admitted that the name of the waiter who was working in the bar is 'Sanju'. He has further admitted that at the time of the incident both, the accused and one Paklo were present, besides himself, waiter Sanju, the person viewing the television and the deceased. He has also admitted that the counter of the bar is at the door and the incident had taken place in front of the door, outside the bar. He also admitted that the deceased had uttered words to accused No.1 when he was at the bar. Accused No.1 was also at the bar at that time. He also admitted that the deceased had uttered words, when the deceased was outside the door. He was confronted with his statement that accused No.1 gave a kick on the leg of the deceased. A contradiction in respect of timing when the accused had come to take their drinks, was also pointed out to Pw.6. Pw.6 has stated in his statement under Section 164 that the accused had come to take drinks at about 10.00 p.m. whereas in his substantive evidence, he has said as 9.45 p.m. He has also admitted in his statement under Section 164 that the accused along with Paklo had entered the bar when the deceased was about to leave. He was confronted with his admission that when each of the accused took half quarter of country liquor, the deceased was standing by the side of the main door. He was confronted with an omission in his statement that the deceased and the accused had exchanged fist blows.

12. In the cross examination he has confirmed that he had stated in examination-in-chief that accused No.1 removed the knife from back pant pocket. He has admitted that it was not a foldable knife. He has stated that the handle of the said knife was read, when in fact, it was brown. He has denied the suggestion that accused No.1 was not present at the time of the incident. He has also admitted that he went to the house of the deceased after about 10 minutes of the incident and volunteered that he had waited for the accused to go away, out of fear of the threat which they had given him. He also states that he had informed some one from the building to phone the police, but does not recollect the name of the person to whom he had so told. He was specifically asked about the light which was outside the bar and has denied that there was no light.

13. In the cross examination on behalf of accused No.2, he has admitted that the counter is to the left as one enters the bar. The counter is about 2 metres long and on one side of the counter, liquor bottles were kept. He admits that he could not see television from the counter as the television set was at a distance of about little more than half a metre from the nearest table. He admits that he could not say how many customers had come to the bar in between the first time the deceased had come and the arrival of the

accused. He also admitted in the cross examination that the said Sapna Building is at a distance of about 15 to 20 metres from the bar.

14. He has also admitted that the knife blow was dealt by accused No.1. The deceased fell about 1 or 2 metres in front of the bar. He states that at the time of the incident, he was just at the entrance of the door. He has also admitted that by his side, his cook Lawrence was also standing. There were two boys by names Tipu and Sanju also present there. He admits that accused No.2 had caught hold of the deceased. According to him, the entire incident lasted for about 15 minutes.

15. Turning to the evidence of the second eye witness, Pw.7, Tripanna Wadar, it is seen that this witness was aged about 14 years when he deposed before the Court. He states that he knew the deceased, as well as both the accused. He further states that he used to visit the Zuari Bar every day to see movies on television. He identifies the helper/waiter as Sanju and the cook as Lawrence. He states that on the day of the incident, he had been to the bar at about 6 p.m. The deceased and his brother had come to the bar. The deceased had some drinks and at about 6.30 p.m., the deceased and his brother left. At about 8.30 p.m., the deceased again came to the bar along with one Tito and

both of them had drinks. At about 9.45 p.m., the deceased again came to the bar and was having drinks. At that time, the two accused and another person came to the bar and they also had drinks. The deceased got up from his place and went to the door of the bar as if to leave. At that time, both the accused also got up and went to the door. The appellant/accused No.1 was near the counter and he told the deceased to behave properly. While the deceased was leaving the bar, the appellant gave a kick on the leg of the deceased and the deceased then gave a fist blow on the mouth of accused No.1. He refers to the second accused giving fist blow on the chest of the deceased. He further states that the accused/appellant then removed a knife from the back pocket of his pant and gave three blows on the deceased. While the appellant was removing the knife, he received slight cut to his right palm. While the appellant was delivering the blows, Pw.6, Caitan was near the door of the bar and the deceased and the appellant/accused were just outside the door of the bar. He also refers to the threats given by the appellant to Pw.6, Caitan not to disclose the incident to anyone. He also speaks about the appellant washing the knife in the puddle of rain water, which had gathered outside the bar. Thereafter, he says that Pw.6, Caitan closed the bar and went to inform about the incident to the house of the deceased. After about 10 minutes, the brother of the deceased came

at the scene of offence and one Mungu arranged for a vehicle and the deceased was taken in that vehicle. He also states that at the time of assault, said Sanju and Lawrence were also present. He also speaks about the electric light inside the bar, just outside the bar and presence of street tube light situated at about 8 to 10 metres from the bar.

16. In cross examination on behalf of the appellant, he states that he was sitting and watching the television and was sitting at a table near the door. He states about the two accused sitting at a table near the television and the deceased sitting at the table behind that of the accused. He corrects himself to say that it was the deceased who had told accused No.1 to take care. Certain omissions were brought out in respect of the presence of Pw.6, near the door and the fact that the time of the assault, accused and the deceased were just outside the door of the bar. The omission was also brought out in respect of the presence of Lawrence at the time of the incident. So also the omission in respect of existence of light outside the bar. He admits that there was no noise when the blow was given, meaning thereby that the deceased did not raise any cries for help.

17. Mr. P.P. Singh, learned Counsel appearing

for the appellant while stressing on the evidence of Pw.7, has urged before us that according to Pw.6, Caitan the deceased and the accused were standing near the bar; whereas, according to Pw.7, the deceased and the accused were sitting at the table. It is also urged before us that Pw.6 was sitting at the counter and, therefore, he could not have seen the incident. Thus, according to the learned Counsel for the appellant, these discrepancies coupled with the omissions in the statement of Pw.7, render the entire prosecution story doubtful and the benefit thereof should be extended to the appellant.

18. It is impossible to expect the two eye witnesses to depose about the sequence of things in an identical manner. The perception of the events, ability of the memory to retain the events and the ability to recall the events after a lapse of time, differ from person to person. Minor variations, in a given case, may afford a reasonable guarantee of the witnesses speaking the truth. The so called discrepancies which have been pointed out to us, are on peripheral matters and do not affect the substratum of the evidence of the two witnesses. The two eye witnesses, namely Pw.6 and Pw.7 have stated in no uncertain terms that the accused/appellant had stabbed the deceased thrice with a knife which he was carrying. Mr. Singh has tried to

urge before us that it was impossible for the appellant to have kept the knife in the pant pocket as the knife was not a foldable knife. We see no merit in this submission as both the witnesses have remained unshaken in respect of their assertions of the incident and it is extremely hazardous for us to extend the benefit of doubt to the appellant by holding that it could not have been possible for appellant to have kept the knife in his back pant pocket. We have carefully scrutinized the evidence of two eye witnesses and we entirely agree with the findings recorded by the learned trial Court who has found the two eye witnesses to be trust-worthy witnesses. We see no reason to take a view different than the one taken by the learned trial Court in respect of the appreciation of the evidence of these two eye witnesses.

19. Pw.11, Dr. Pujari, who had conducted the post-mortem report, has referred to the external injuries and the internal injury, as a result of the external injuries. It was sought to be urged before us that Pw.11, Dr. Pujari did not notice the smell of alcohol and, therefore, the entire version of the prosecution was belied by the evidence of Pw.11, Dr. Pujari. In re-examination of Pw.11, Dr. Pujari, the witness has admitted that within about one hour or one and half hours, the alcohol will get absorbed in the

body and the stomach contents will not give smell of alcohol. He has further clarified that the rapidity or the rate at which it absorbs, will depend upon :- (i) concentration of alcohol consumed, (ii) quantity, (iii) the rate at which it was consumed, (iv) the mucous of the stomach, (v) contents of the stomach meaning thereby whether it was empty or full, and (vi) the quality of the food present. He has also clarified that the smell may get masked in case a person has eaten food with strong smell and the stage of digestion. He had noticed 150 CC of paste like semi-solid, semi- digested material. He has also stated that if the alcohol was completely absorbed, the stomach contents would not get a smell of alcohol. Thus, we do not find from the evidence of Pw.11, Dr. Pujari, that the medical evidence, is contradictory to the ocular testimony of the witnesses. Merely because Pw.11, Dr. Pujari did not notice smell of alcohol, would not render the otherwise reliable testimony of the eye witnesses, as unreliable. Pw.11, Dr. Pujari has ascribed various reasons which would control the rate of absorption of the alcohol.

20. Apart from the evidence of eye witnesses, there is a strong case of circumstantial evidence. The clothes of the accused were found to be stained with blood group of the deceased. The clothes of the

appellant/accused were seized pursuant to the memorandum of attachment under Section 27 of the Evidence Act from the house of the accused No.1. The pancha has supported the evidence of the Investigating Office and we see no reason to discard this piece of evidence. Another circumstance, namely existence of an injury on the base of the thumb of the appellant, corroborates with what Pw.7 had stated that appellant/accused had received injury while removing the knife from his back pant pocket.

21. Even if we accept the submission of learned Counsel for the appellant that the prosecution, through the evidence of Pw.8, Tito has not been successful in proving the previous quarrel, the evidence of two eye witnesses, coupled with other circumstantial evidence, according to us, is sufficient to justify the conviction passed by the learned trial Court. Even the knife, MO.12 was stained with blood group of the deceased. The knife MO.12 was recovered from the bushes near a bridge pursuant to the memorandum of attachment, under Section 27 of the Indian Evidence Act.

22. After giving our anxious consideration and after perusing the evidence of eye witnesses, we are of the considered opinion that the prosecution has proved the offence against the appellant/accused beyond

reasonable doubt. The appellant/accused, according to us, is not entitled to be given benefit of doubt as claimed by him. We see no merit in this appeal and the same is dismissed. Since the appellant is in Jail, a copy of this Judgment be furnished to the appellant through the Superintendent of Central Jail, Aguada.

P.V. KAKADE, J

P.V. HARDAS, J.

ssm.